IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LANDMARK LLC, Appellant/Cross Respondent, v. THE SAKAI QTIP TRUST; THE GRANDCHILDREN OF KIMIKO R. SAKAI TRUST; KIMIKO R. SAKAI, individually and as co-trustee of the SAKAI QTIP TRUST: J. ANTHONY HOARE, as co-trustee of the SAKAI QTIP TRUST and as trustee of THE GRANDCHILDREN OF KIMIKO R. SAKAI TRUST; JOHN D. SAKAI; PAUL D. SAKAI; MARY ANN R. ARNONE; JOHN DOES 1 through 20, Respondents/Cross Appellants.	No. 36663-1-II UNPUBLISHED OPINION

Armstrong, J. — In 1998, Landmark LLC entered into a purchase and sale agreement to purchase land from its co-owners, the Sakai QTIP Trust and The Grandchildren of Kimiko R. Sakai Trust (Kimiko Sakai, John Sakai, Paul Sakai, and Mary Ann Arnone) (collectively Sakai). Over the next several years, the parties attempted to renegotiate that transaction several times but never reached a new agreement. Landmark then sued Sakai for breach and specific performance of the agreement, equitable estoppel, breach of the covenant of good faith and fair dealing, and unjust enrichment. Sakai counterclaimed for trespass based on storm water retention tanks Landmark had installed partly on Sakai property. Both parties now appeal. Landmark argues that the trial court erred in (1) dismissing its first three claims on summary judgment, (2) awarding damages contingent on future events on its unjust enrichment claim, and (3) awarding Sakai attorney fees for prevailing on the contract claims but not to Landmark for prevailing on its unjust enrichment claim. Sakai argues that the trial court erred in awarding any relief on Landmark's unjust enrichment claim and in failing to award relief on its trespass claim. We affirm the trial court's summary judgment decision on the contract claims and its decision awarding attorney fees to Sakai and not to Landmark; we reverse the trial court's awards for unjust enrichment and contingent future damages, and remand for the trial court to grant Sakai relief on the trespass claim.

FACTS[1]

On November 11, 1998, the parties entered into a Purchase and Sale Agreement (Agreement) wherein Sakai agreed to sell two nine-acre parcels of land to Landmark for $2,050,000. At the time, Landmark intended to build a retirement community on the property, and Sakai executed an owner/applicant agreement that allowed Doug Nelson, Landmark's agent in the transaction, to pursue land use approval from the city of Bainbridge Island on its behalf. John Sakai[2] acted as the Sakai "contact person" with Nelson.

The Agreement provided a 120-day period for Nelson to complete a "feasibility study" of

[1] On its contract claims, Landmark "relies exclusively on the sworn testimony of Sakai, the conduct of Sakai, and the email correspondence authored by Sakai." Br. of Appellant at 27 n.8. But where the record provides additional facts that support Landmark's position, we include them even though Landmark does not argue them. *See Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (in reviewing order on summary judgment, court reviews all facts in light most favorable to the nonmoving party). We do not include facts developed at the subsequent bench trial. *See Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005) (following summary judgment, a reviewing court takes the position of the trial court and examines those pleadings, affidavits, and depositions before it at the time).

[2] For clarity, we refer to John Sakai by his first name. We intend no disrespect.

the project and close the deal if Landmark was satisfied with the results. Clerk's Papers (CP) at 62. If Landmark did not exercise the contingency within that period, the parties had 12 months to close the transaction at the contract price. Thus, without extensions, the Agreement expired on March 11, 2000. The Agreement also provided that Landmark could "secure up to [18] . . . 30 day extensions of the closing date" by paying $13,500 for each extension. CP at 62. Under that term, the Agreement could be extended to September 11, 2001. The sale was contingent on the city's approval of the proposed development. The Agreement also contained a "[t]ime is of the essence" clause. CP at 59.

A few months after executing the Agreement, Landmark concluded that a retirement community development was not feasible. Landmark did not invoke its right to revoke the Agreement and later agreed on two addenda on other matters. During the remaining months of the contract period, Landmark worked on a new plan for a "high density" development of apartments or condominiums, the "Sakai Village." This project was to be completed in two phases, with Phase I on the Madison Glen property north of the Sakai property and Phase II on the Sakai property.

John and Nelson met on March 31, 2000, after the Agreement's expiration date. According to Nelson, he was ready to make the first extension payment to John, but John "wouldn't take [his] money," instead promising to "honor the original agreement" while they renegotiated the price. CP at 316, 341. John testified that Sakai had decided to allow Nelson to continue pursuing the new development, but he told Nelson that Sakai was still "willing" to sell the property and that it would negotiate with Landmark in good faith regarding the price. CP at

227. Both parties agreed that the purchase price would be the fair market value of the property.

Over the next several months, Nelson obtained the Phase I property and worked with the city to obtain approval of that part of development. In the summer of 2000, Nelson initiated attempts to "close" the sale transaction with Sakai, even preparing a new purchase and sale agreement that he described in an e-mail to John as "a bit sweeter" so that he would "like it." CP at 78. The deal did not close, however, because Landmark's lender wanted city approval of Phase II before it financed the purchase.

Landmark began construction of Phase I in 2001. While putting in storm water retention tanks, Nelson asked Sakai for permission to install tanks on the Sakai property because "it was cheaper to do it all at once." CP at 137. Sakai granted permission but told Nelson that "you put [them] in at your own risk. If you do not buy the property, you must take them out." CP at 137.

When it appeared that the city was close to approving the project in June 2001, Nelson wrote Sakai that "[a]s we get closer, we will need to tie up a few of these loose ends," including that "[w]e are out of contract and need to get that buttoned up."[3] CP at 368. But soon after, Sakai told Nelson that it wanted to sell Landmark only one of the two lots originally included in the sale.[4] Nelson protested, writing Sakai on August 10, 2001, that:

> [T]here is a fundamental issue that must be resolved before we can proceed. We have always had an agreement to sell me both ten acre parcels. There shouldn't be any question as to whether I will be purchasing the property. When that agreement initially expired you assured me that you would honor it and did not require me to make the extension payment because of the hold ups in the City. I

[3] In his deposition, Nelson stated that his phrase "out of contract" was "a nice way of saying that [Sakai] had breached the [A]greement by their unwillingness to close." CP at 416.

[4] John testified in his deposition that they had started to doubt Nelson's judgment on the project because the type of buildings that Nelson was building did not fit with the neighborhood and would not be marketable.

> have also agreed to pay what ever appreciation the property may have incurred as time as past [sic]. All of my actions to date have been done in justifiable reliance upon your families' promise to sell me both parcels.

CP at 373. Nevertheless, Nelson engaged in "serious negotiations" for a reduced sale of property. CP at 136. Those negotiations failed months later because of a dispute over easements.

Between December 2001 and October 2003, Landmark and Sakai had little contact. Nelson's Phase I units were not selling because of poor design and a depressed market after September 11, 2001. In October 2003, negotiations reopened regarding Landmark's desired purchase of the Sakai property. But those negotiations ultimately failed as well.

Landmark filed this action for breach of contract, specific performance, unjust enrichment, equitable estoppel/detrimental reliance, and breach of the covenant of good faith and fair dealing. Sakai counterclaimed for trespass by Landmark's storm water detention tanks, seeking an order that Landmark remove them. It also asked for attorney fees under the Agreement.

A. Summary Judgment on Claims Enforcing Sale

Sakai moved for summary judgment on Landmark's contract, equitable estoppel, and good faith and fair dealing claims. Sakai argued that (1) the Agreement had expired, (2) any verbal contract that remained did not comply with the statute of frauds, and (3) specific performance was not available where the parties had not agreed on price and where Landmark was in default. Landmark argued that the Agreement had not expired because (1) Sakai never communicated such to Landmark, and (2) Sakai had "waived any such expiration date" by waiving the extension payments the Agreement required. CP at 38. Instead, Landmark reasoned, Sakai's agreement in March 2000 to sell the property for fair market value "changed the 1998 'fixed price' Purchase and Sale Agreement into an agreement with an open term." CP at 449.

On Landmark's equitable estoppel claim, Sakai argued that it had never asserted there *was* a contract after the Agreement's expiration date, and Landmark's belief to the contrary was unreasonable because so many essential terms of the deal were constantly "in a state of flux." CP at 287. It further argued that Nelson knew or should have known that they were "out of contract" yet "'conduct[ed] himself with a careless indifference'" to that information. CP at 286, 288 (quoting *Elmonte Inv. Co. v. Schafer Bros. Logging Co.*, 192 Wash. 1, 33, 72 P.2d 311 (1937)). Landmark responded that *promissory* estoppel principles obligated Sakai to sell the property as promised to Landmark for fair market value. Sakai responded that it had made no promise to sell the property and that if Landmark relied on Sakai's statements to continue to negotiate, such reliance was unjustifiable.

The trial court granted Sakai's motion for summary judgment on the breach of contract and specific performance claims, ruling that "there is no specific performance of a contract for which the price blank is missing" and that a contract with "an open-ended term in terms of fair market value" was not enforceable as a matter of law. Report of Proceedings (RP) (March 25, 2005) at 2-3. The trial court also summarily dismissed Landmark's equitable estoppel claim, reasoning that even if the doctrine applied, the court had no contract to enforce. In addition, the court dismissed Landmark's claim for breach of the covenant of good faith and fair dealing because it is "not an independent claim and must attach to a contract." RP (March 25, 2005) at 4.

B. Unjust Enrichment Claim

Landmark subsequently moved for summary judgment on its unjust enrichment claim, requesting $750,000 in damages for its costs in obtaining the site plan approval for the Sakai property and the enhanced property value as a result of the approval. Sakai responded that it was not enriched because it had not acted on the approval, which would also expire in January 2007. Landmark countered that the eventual expiration of the approval was "irrelevant" under the Restatement (Second) of Contracts section 370 comment *a*, and the trial court agreed, ruling "[a]s a matter of law, that the Site Plan Approval may expire does not change the fact of enrichment or benefit, as a benefit wasted is still a benefit." CP at 997. It therefore granted Landmark's motion in part, ruling that a question of fact remained "as to whether the enrichment is 'unjust'" and as to the amount of the benefit. CP at 997.

After a bench trial, the trial court concluded that Nelson had unclean hands because he had (1) submitted doctored plans when he asked Sakai to approve installing the storm tanks in March 2001; (2) falsely represented that he had procured easements from other abutting owners when he sought an easement from Sakai; (3) concealed from Sakai that his development plans used a phase line different from the boundary line between the Phase I and Phase II properties; (4) made a number of false representations during the 2001 negotiations regarding costs and obligations he accrued in reliance on his belief Sakai would sell; (5) falsely represented that he could not close any sales in Phase I without various easements that he wanted from Sakai; (6) attempted to "slip in" provisions into drafts of a new purchase and sale agreement that had either not been discussed or that were contrary to prior oral agreement; (7) after agreeing on a purchase price of $28,000 per unit, claimed that his development included only 93 units when the site map showed 97 units; and (8) falsely represented in March 2004 that Landmark's shareholders had terminated him as the Landmark manager. The trial court also found that several parts of Nelson's testimony at trial were false, as was his claim that he had lost certain evidence.

The trial court concluded, however, that although Landmark's unclean hands would ordinarily deprive it of any equitable relief, Sakai's retention of the enhanced value of its property was unjust because "the Sakai Family also ha[d] dirty hands." CP at 1290. Specifically, the trial court concluded that "[u]nder the circumstances of this case, the Sakai Family had a duty to speak," and "[b]ecause the family remained silent, their silence under these circumstances is tantamount to deception." CP at 1290. It further ruled that Sakai's "failure to rescind the Owner Applicant [Agreement] is equivalent to a request that Nelson continue to proceed to procure Site Plan Review approval for the Sakai Property." CP at 1290. Accordingly, within the context of the "Volunteer Rule," Nelson was not a volunteer. CP at 1290.

The trial court concluded that Sakai had breached a "duty to speak" because it (1) did not advise Nelson that it had lost confidence in his integrity in March 2000, thereby permitting him to assume that it held a continuing interest in the relationship; (2) outwardly supported Landmark's development proposals, even providing family names to use in naming the streets in it; (3) discussed among the family the "significant leverage" it had because of "non-market considerations" during both the 2001 and 2003-04 negotiations; (4) left the owner applicant agreement in place in October 2003 without communicating its distrust and lack of confidence to Nelson; (5) told Nelson that it would consider his November 2003 comparable sales analysis even though it had already concluded that the price was unfair and had "no intention" of accepting it; (6) purposefully provided very little input or participation in the city approval process; (7)

calculated its own fair market price in February 2004 but never communicated it to Nelson or otherwise countered Landmark's $2.6 million offer; and (8) did not mention its reservations about dealing with Nelson until March 2004. CP at 1278, 1281. The trial court also noted that Sakai knew that Nelson was pursuing the Phase I development because he believed he would be successful in negotiating a new purchase agreement with it. Based on these facts, the trial court found that Sakai shared "some of the blame for the problematic negotiations." CP at 1287. It concluded that under these circumstances, Sakai should reimburse Landmark for any benefit conferred by the site plan approval.

The trial court awarded Landmark $125,000 in unjust enrichment damages for the reasonable costs and fees it incurred in procuring Phase II site plan review approval. It also concluded that Landmark had a valid claim based on a sewer lift station it had built. The sewer lift station was on the Phase I property but had enough capacity to serve Phase II as well. The trial court found that it was "likely that the city will require a [future] developer of the Sakai property to hook up to this station." CP at 1286. But it was "not known" whether any buildings on the Sakai properties *could* connect to the station "because of (1) topography, gravity flow and soil considerations; (2) the unknown capacity of the storage tanks in the lift station; (3) the apparent absence of an easement over the [Phase 1] Property to the lift station . . .; and (4) the unknown status of the City's position regarding a hook-up versus other alternatives." CP at 1279. Therefore, the trial court concluded, "[A]n award of damages is only appropriate if and only if the developer of the Sakai property <u>does</u> hook up." CP at 1286. It ruled that "[i]f, in connection with the subsequent development of the Sakai Property, a connection is made to the

Sewer Lift Station on the Sakai Village Phase I Property, the Sakai Family (or their then successors-in-interest), should pay the principal sum of $100,000.00 without interest to Landmark at the time of the connection." CP at 1291.

C. Trespass Claim

On Sakai's trespass counterclaim, the trial court found that the storm tanks placed by Landmark "straddle[d] the property line resulting in a physical invasion of the Sakai Family property." CP at 1287-88. As a result, "a 'no-build zone'" existed on that part of the property. CP at 1288. Nonetheless, the trial court denied Sakai any trespass relief because (1) it had failed to prove actual and substantial damages resulting from the trespass and (2) removal of the tanks was "not required" because "[t]he damages to non-parties and innocent homeowners far outweighs the uncertain benefit of removal to the Sakai Family." CP at 1288. Specifically, removal would be "difficult" because the tanks would have to be replaced or substituted for the current residents of Phase I, at great inconvenience and unknown cost. CP at 1288.

D. Attorney Fees

The 1998 Agreement provides that "[i]f Buyer [or] Seller . . . institutes suit concerning this Agreement . . . the prevailing party is entitled to court costs and a reasonable attorney's fee." CP at 60. After the bench trial, both parties moved for fees under this provision, although Sakai limited its request to fees incurred for defending Landmark's contract claims. The trial court granted Sakai's motion, ruling that Landmark's specific performances and breach of contract claims "'concerned' or arose from the parties' written Agreement" because the Agreement was "central" to those claims. CP at 1289. It denied Landmark's motion for fees because the unjust enrichment claim "did *not* 'concern'" or arise from the expired written Agreement and because that Agreement was not central to that claim. CP at 1289 (emphasis added).

The trial court entered judgment against Sakai for $74,810.05 after offsetting Sakai's attorney fee award against the unjust enrichment damages.

ANALYSIS

I. Summary Judgment

Landmark argues that the trial court erred in granting summary judgment to Sakai on its claims for breach of contract, equitable estoppel, and breach of the implied covenant of good faith and fair dealing. A trial court properly grants a motion for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We review an order on summary judgment de novo, viewing the facts in the light most favorable to the nonmoving party. *Vallandigham*, 154 Wn.2d at 26.

A. Contract Claim for Specific Performance

Landmark argues that the trial court erred by ruling that contracts with open price terms are unenforceable as a matter of law because "Washington law recognizes agreements with open terms." Br. of Appellant at 22 (emphasis omitted). The case on which Landmark relies, however, does not support this assertion; the court explicitly stated that the issue of contracts with open terms was not before it. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176 n.9, 94 P.3d 945 (2004). Moreover, we need not consider whether contracts with open terms are enforceable because the agreement here was unenforceable for other reasons.

Landmark argues that a binding contract remained in effect after March 2000 because Sakai was still "willing" to sell the property to Landmark. Br. of Appellant at 7. But a contract requires offer, acceptance, consideration, and, in the case of a contract to purchase real estate, compliance with the statute of frauds. RCW 64.04.010; *Berg v. Ting*, 125 Wn.2d 544, 551, 886

P.2d 564 (1995); *Veith v. Xterra Wetsuits, LLC*, 144 Wn. App. 362, 366, 183 P.3d 334, *review denied*, 165 Wn.2d 1005 (2008). Specifically, a contract for the conveyance of land must occur by a deed complying with RCW 64.04.020. *Berg*, 125 Wn.2d at 551. Here, the parties' 1998 Agreement complied with all of the requirements of a contract, but it expired either on March 11, 2000, or on September 11, 2001.[5] Thereafter, the parties had at most an agreement to agree in the future on two critical components of the negotiations: the price and the amount of land to be purchased. And "[a]greements to agree" are not enforceable in Washington. *Keystone*, 152 Wn.2d at 176.

Landmark argues that the Agreement remained effective despite its expiration because Sakai "ratified" it at the March 2000 meeting.[6] Br. of Appellant at 27 (emphasis omitted). This argument fails because the doctrine of ratification applies only to *voidable* contracts, i.e., those that continue to be effective unless one party takes action to avoid them. *See Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 793-94, 150 P.3d 1163 (2007); *see generally Stabbert v. Atlas Imperial Diesel Engine Co.*, 39 Wn.2d 789, 792, 238 P.2d 1212 (1951). Contracts that have expired are *void* and therefore incapable of being enforced regardless of the parties' actions. *Mid-Town Ltd. P'ship v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268 (1993) (citing *Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164 (1968)). Ratification cannot save an expired contract.

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[5] Because the Agreement expired, we do not consider Landmark's arguments regarding its "time is of the essence" clause.

[6] A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, the party remains silent or continues to accept the contract's benefits. *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 793-94, 150 P.3d 1163 (2007); *see generally Power v. Esarey*, 37 Wn.2d 407, 417, 224 P.2d 323 (1950).

Finally, Landmark argues that the parties had an "agreement to negotiate" that "provides an alternative basis to specifically enforce the purchase and sale transaction." Reply Br. of Appellant at 14-15. But Landmark fails to acknowledge the language that it quotes from *Keystone* in its own brief: "Under a contract to negotiate, the parties do not intend to be bound if negotiations fail to reach ultimate agreement on the substantive deal. . . . [N]o breach occurs if the parties fail to reach agreement on the substantive deal." *Keystone*, 152 Wn.2d at 176. Again, an "agreement to agree" is not enforceable. *Keystone*, 152 Wn.2d at 176. The trial court did not err in granting summary judgment on Landmark's claim for specific performance.

B. Estoppel

Landmark argues that the trial court erred in dismissing its equitable estoppel claim. The record is somewhat confusing as to whether Landmark intended to bring an equitable estoppel or a *promissory* estoppel claim. Because the trial court treated the claim as one for promissory estoppel with the parties' acquiescence,[7] we consider only promissory estoppel.

A promissory estoppel claim is based on the existence of a promise and may be used offensively to enforce that promise even if there is no mutual assent or consideration. *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 398, 879 P.2d 276 (1994); *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 258-59, 616 P.2d 644 (1980). Here, the evidence shows at most that Sakai promised only to continue negotiating with Landmark; it never promised to sell a

[7] Both parties discussed the claim as one for promissory estoppel in at least some of their summary judgment briefing. And although Landmark's complaint pleaded equitable estoppel, it alleged that "Defendants are equitably estopped from refusing to *honor their agreement* to complete the purchase and sale transaction." CP at 8 (emphasis added). Also, when the trial court ruled on the motions, it framed the estoppel issue as if Landmark was seeking to enforce a promise to sell the land. Sakai did not object.

set quantity of land at a set price. Landmark argues, however, that the promise to sell at fair market value is enforceable.

But in the absence of evidence that the parties had agreed on a particular appraiser who would set a fair market value according to an objective formula, any promise to sell at "fair market value" is illusory and unenforceable. Moreover, the claimed promises here were oral and therefore subject to the statute of frauds.[8] *See Greaves*, 124 Wn.2d at 401 (declining to adopt Restatement (Second) of Contracts section 139). Promises to convey real property are not enforceable without a written deed. Landmark's promissory estoppel claim fails.

C. Implied Covenant of Good Faith and Fair Dealing

Every contract carries with it an implied covenant of good faith and fair dealing that obligates the parties to cooperate with one another so that each may obtain the full benefit of performance. *Frank Coluccio Constr. Co., Inc. v. King County*, 136 Wn. App. 751, 764, 150 P.3d 1147 (2007) (citing *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)). But the duty exists only "'in relation to performance of a specific contract term'"; there is no "'free-floating' duty of good faith and fair dealing that is unattached to an existing contract." *Keystone*, 152 Wn.2d at 177 (quoting *Badgett*, 116 Wn.2d at 570).

Landmark's assertions of bad faith revolve around Sakai's failure to "disabuse Landmark of the existence of their Agreement" and its attempt to take advantage of Landmark's

[8] There is one narrow circumstance in which promissory estoppel may provide an exception to the statute of frauds, but it does not apply in this case: "A party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the statute of frauds, and then breaks that promise, is estopped [from] interpos[ing] the statute as a defense to the enforcement of the contract by another who relied on it to his detriment." *In re Estate of Nelson*, 85 Wn.2d 602, 610-11, 537 P.2d 765 (1975) (citing 1 Restatement (First) of Contracts § 178 cmt. *f*).

expenditures and improvements to obtain a "premium price" instead of a "fair market value." Br. of Appellant at 36. The conduct did not arise from performing a contract term; indeed, there was no contract in place at the time. The trial court did not err in dismissing this claim.

II. Unjust Enrichment

Both parties assign error to the trial court's disposition of Landmark's unjust enrichment claim after trial. Landmark challenges the trial court's contingent imposition of damages for the sewer lift system, arguing that (1) Sakai's current "right" to hook up to the lift station adds real present value to its property and (2) a "wasted" benefit is still a benefit for purposes of unjust enrichment. Br. of Appellant at 48. Sakai argues that the trial court erred in awarding Landmark any unjust enrichment damages at all, particularly because that relief is not available where both parties have unclean hands. The trial court ruled that the legal significance of Landmark's "dirty hands" was overcome by Sakai's "dirty hands." CP at 1290.

We review bench trial decisions in two steps: we first ask whether substantial evidence supports the trial court's challenged findings of fact; we then ask whether those findings of fact support the court's conclusions of law. *See Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. If this standard is satisfied, we will not substitute our judgment for the trial court's. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). We review questions of law and conclusions of law de novo. *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d at 880.

Unjust enrichment allows a party to recover the value of a benefit it has conferred on another party where, absent any contractual relationship, notions of fairness and justice require such recovery. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). A party seeking an unjust enrichment award must show that (1) the defendant has received a benefit, (2) the benefit was at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Young*, 164 Wn.2d at 484-85. In such situations, a "quasi contract" or "contract implied in law" exists between the parties. *Young*, 164 Wn.2d at 484 (citing *Bill v. Gattavara*, 34 Wn.2d 645, 650, 209 P.2d 457 (1949)).

Generally, a court applying equitable principles will not "balance the equities between the parties when they are both in the wrong, nor give the complainant relief against his own vice and folly." *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 72, 113 P.2d 845 (1941); 15 Karl B. Tegland, Washington Practice: Civil Procedure § 44.16, at 239 (1st ed. 2003). Thus, equitable relief is not available where *both* parties have unclean hands. Rather, "[e]quity leaves the parties in pari delicto to fight out their own salvation and remedy their own wrongs in the law court." *J.L. Cooper*, 9 Wn.2d at 72.

Landmark contends, however, that the trial court correctly declined to apply the unclean hands doctrine because its "dirty hands" conduct had no "causal relationship" with "the substance of the equitable claim at issue." Reply Br. of Appellant at 23. It is true that equity disqualifies a plaintiff with unclean hands only where the inequitable behavior is "in the very transaction concerning which he complains." *McKelvie v. Hackney*, 58 Wn.2d 23, 31, 360 P.2d 746 (1961) (quoting *J.L. Cooper & Co.*, 9 Wn.2d at 73) (emphasis omitted).

Here, the underlying transaction was Sakai's sale of real estate to Landmark, to be developed by Landmark. The sale was contingent on city approval of the proposed development, and Sakai granted Nelson authority to pursue that approval. Thus, the sale and the development project were intimately connected. And much of Nelson's misconduct centered on the approval procedure, which was in turn connected with Landmark's development of its adjoining property. The trial court found in unchallenged findings that (1) Nelson refused to work with the adjoining developer for shared access routes with the Sakai property as the city requested and did not advise Sakai of the request, (2) after filing the new Sakai plan on June 28, 2000, Nelson made no effort to move the application along, (3) Nelson moved the "phase line" of his northern parcel well south into the Sakai property, showing some of the northern property units on Sakai property, (4) Nelson falsely claimed that the northern property storm water facilities, built partly on Sakai property, were designed and built to serve the Sakai property also, (5) when seeking Sakai's permission to put part of the northern property's storm water system on Sakai property, Nelson "whited out" the altered phase line showing northern property units on Sakai property, (6) Nelson falsely represented to Sakai that he had already obtained easements from the other owners along the proposed sewer line, while seeking sewer line easements from Sakai, (7) Nelson concealed the altered phase line from Sakai, (8) Nelson falsely represented a number of his development costs during negotiations with Sakai, (9) Nelson falsely represented in part his need to obtain easements from Sakai to sell his northern property units, and (10) on December 7, 2001, Nelson asked the city to put his Sakai site plan application on hold without telling Sakai. CP at 1275.

Nelson's misconduct delayed Sakai's property sale and reduced its value by some amount by encumbering it with part of the storm water drain system. Nelson may also have caused Sakai to lose the benefit of developing joint access with the previous northern property owner. Moreover, he attempted to encumber the Sakai property with easements to benefit his northern property. We conclude that the trial court erred in granting Landmark unjust enrichment damages.

III. Trespass

Sakai claimed that storm water tanks on its land constituted a "continuing trespass," or "'an unprivileged remaining on land in another's possession.'" *See Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985) (quoting Restatement (Second) of Torts § 158 cmt. *m*, at 280 (1965)). Sakai sought an order requiring Landmark to remove the tanks, which is generally the proper remedy to compel the removal of an encroaching structure. *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800, 450 P.2d 815 (1968). But although the trial court concluded that the storm tanks resulted in a "physical invasion of the Sakai Family property," it declined to either order an injunction or award damages. CP at 1288-89.

The trial court's decision not to grant an injunction may fall within Washington's recognized exception under *Arnold*, 75 Wn.2d at 152. This exception applies where a mandatory injunction would be "oppressive," and is triggered where the encroacher establishes that (1) he did not simply take a calculated risk, act in bad faith, or negligently, willfully, or indifferently locate the encroaching structure; (2) the damage to the landowner is slight and the benefit of removal equally small; (3) there is ample remaining room for suitable structures and no real limitation on the property's future use; (4) it is impractical to move the encroaching structure; and (5) there is an enormous disparity in the resulting hardships. *Arnold*, 75 Wn.2d at 152.

The trial court's findings of fact support most of these elements. The trial court found that Sakai had not shown "actual and substantial damages," which supports the conclusion that the damage to it was "slight and the benefit of removal equally small." CP at 1292; *Arnold*, 75 Wn.2d at 152. Indeed, the storm tanks merely "straddle the property line," which suggests that they did not encroach more than a few feet. CP at 1287; *compare Arnold*, 75 Wn.2d at 145 (eight foot encroachment). Considering that the parcel at issue was 10 acres, this finding supports the conclusion that "there [is] ample remaining room" for future structures to be built and is "no real limitation" on the property's future use. *Arnold*, 75 Wn.2d at 152. The trial court also gave several reasons why removing the tanks would be "difficult" and concluded that "[t]he damages to non-parties and innocent homeowners far outweigh[ed] the uncertain benefit of removal to the Sakai Family." CP at 1288. The only *Arnold* element potentially not satisfied is the first: whether Landmark took a calculated risk or acted negligently in placing the tanks on Sakai's land when it did not own it. *Arnold*, 75 Wn.2d at 152. The trial court made no findings on this issue, but John testified that he explicitly told Nelson when he installed the tanks that he would have to remove them if the sale did not go through. Nelson's decision to go forward despite this warning could be considered taking a calculated risk.

But regardless of whether the *Arnold* exception applies, the trial court was not free to decline *all* relief to Sakai. Sakai is correct that "the law simply cannot allow someone to place improvements on, or appropriate another's land, with impunity." Br. of Resp't at 47-48. In *Arnold*, the court awarded the plaintiff damages equaling the value of the area covered by the encroachments after granting the defendant an easement for that area. *Arnold*, 75 Wn.2d at 153; *see also Proctor v. Huntington*, 146 Wn. App. 836, 851, 192 P.3d 958 (2008) (forced *sale* of encroached land an acceptable remedy in lieu of injunction), *review granted*, 205 P.3d 132 (2009). On remand, the trial court must either award Sakai damages for the continuing trespass or order Landmark to remove the encroaching structures.

IV. Attorney Fees

Landmark argues that the trial court erred in awarding Sakai, rather than Landmark, attorney fees. Both parties moved for fees under the Agreement, which provided that "[i]f Buyer [or] Seller . . . institutes suit *concerning this Agreement* . . . the prevailing party is entitled to court costs and a reasonable attorney's fee." CP at 60 (emphasis added). The trial court ruled that only Landmark's breach of contract and specific performance claims "concerned" the Agreement, and because Sakai prevailed on those claims, Sakai was entitled to the fees it expended on them. CP at 1289. We review de novo a trial court's decision awarding attorney fees under RCW 4.84.330. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009); *Quality Food Ctrs. v. Mary Jewell T, LLC*, 134 Wn. App. 814, 817, 142 P.3d 206 (2006).

Landmark argues that it is the "prevailing party" in this case under RCW 4.84.330 because it prevailed on its unjust enrichment claim. It reasons that a "prevailing party" must be one who "obtain[s] relief" such as damages, i.e., only a plaintiff or the person who has judgment rendered in his favor "at the conclusion of the entire case." Br. of Appellant at 39 (quoting *Stott v. Cervantes*, 23 Wn. App. 346, 348, 595 P.2d 563 (1979) (quoting *Ennis v. Ring*, 56 Wn.2d 465, 473, 341 P.2d 885 (1959))). But we have reversed Landmark's unjust enrichment award, holding as a matter of law that Landmark is not entitled to such relief. And a party who successfully *defends* against a claim can be the prevailing party. *Mike's Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68, 975 P.2d 532 (1999); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 196-97, 692 P.2d 867 (1984). Sakai successfully defended against all of

Landmark's claims. As the ultimate prevailing party, Sakai is entitled to attorney fees incurred during trial. It is also entitled to fees on appeal in an amount to be set by a commissioner of this court upon compliance with RAP 18.1.

We affirm the trial court's summary judgment decision on the contract claims and its decision to award attorney fees to Sakai; we reverse the trial court's award for unjust enrichment and for contingent future damages, and remand for the trial court to grant Sakai relief on the trespass claim.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, C.J.